Testimony of Julian Davis Mortenson
Professor, Michigan Law School

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Michigan House of Representatives
House Committee on Judiciary
Anderson Office Building, Room 521
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Thanks to the Committee for giving me the opportunity to testify today. I am a professor of constitutional law at Michigan Law School and have been involved with LGBT rights advocacy for most of the last decade. I am also a Sunday School teacher and a father to three children who I'm raising in the Methodist faith. So the topics you are considering today are of great interest to me both professionally and personally.

I understand that the Committee is considering the passage of a bill that would add sexual orientation and gender identity protections to the Elliott-Larsen Civil Rights Act. I also understand that concerns have been raised about the religious liberty implications of adding such protections. To address these concerns, the committee is now considering the enactment of House Bill 5958, which would provide that the "government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability."

Enacting the House Bill would, in my view, be both unnecessary and unwise. The First Amendment provides absolute protection for religious beliefs, and important protections for religious exercise. See *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940); *Employment Division v. Smith*, 494 U.S. 872, 876-877 (1990). "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. . . . The government may not compel affirmation of religious belief, punish the expression of religious

doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma." *Id.* 1.

Even without additional legislation, the rights of religious organizations already receive special solicitude under the First Amendment. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012), the United States Supreme Court recognized that churches and other religious organizations have the right to choose their ministers without interference from civil authorities. As Chief Justice Roberts explained, the plaintiff in that case (a kindergarten teacher at a Lutheran school in Michigan) qualified as a "minister" because of her title and religious functions. She therefore couldn't sue the school for firing her in violation of the Americans with Disabilities Act. The right of religious institutions to employ individuals of their choosing is thus already well established in federal constitutional law.

Religious freedoms are firmly entrenched in state law as well. The Elliott-Larsen Act itself provides significant protections for religious institutions. Truly private organizations "not in fact open to the public" are not subject to the public accommodations law at all. Sec 37.2303. The Act grants religious schools the ability to "limit[] admission or give[] preference to an applicant of the same religion." Sec. 37.2403. The Act also provides that an employer may hire an employee of a particular faith if that is "reasonably necessary to the normal operation of the business or enterprise." See Sec 37.2208. And Michigan courts have already ruled as a constitutional matter that religious organizations are exempt from employment discrimination claims brought by employees who occupy religious positions. *Weishuhn v. Catholic Diocese of Lansing*, 279 Mich. App 150, 173, 756 N.W. 2d 483, 497.

In short, members of faith communities already enjoy a robust range of protections for our religious liberty under both state and federal law. Given the strength of these existing protections, the adoption of House

Bill 5958 would serve no useful purpose that could counterbalance the harms it might create.

And the harms might be significant indeed. Because the House Bill, if adopted, could give rise to an unsettling array of legal challenges to basic protections that we take for granted, stirring up state-wide uncertainty that would be thrown to the courts to sort out on a case-by-case basis. Imagine a bank that bars women from management positions, citing First Timothy for the proposition that "I permit no woman to teach or to have authority over a man; she is to keep silent." 1 Tim 2:12. Imagine a firefighter who violates his obligation to put out a fire at someone else's house of worship, because he thinks the place leads innocent souls away from salvation. Or imagine a hospital that serves only white patients, because its board agrees with the District Court in *Loving v. Virginia* that "'Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix.'" 388 U.S. 1, 2 (1967).

I trust that each scenario seems as outrageous to you as it does to me. But as a lawyer, it is not hard to imagine the litigation quagmire that would emerge from claims—whether feigned or sincere—that adhering to the law in cases like these would "substantially burden a person's exercise of religion." The legislature should not open the door to this take-your-pick version of the rule of law.

Thank you again for giving me the opportunity to testify today. I am happy to discuss any questions you might have.